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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-655

CHARLES NICKLAUS ET ALS
Petitioners

v.

THE CITY OF COLUMBUS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

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October Term, 1973

No.

CHARLES NICKLAUS ET ALS
Petitioners

v.

THE CITY OF COLUMBUS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioners, Edwards, Lastorias and Trapps, pray for a writ of certiorari to review the orders of the Supreme Court of Ohio entered June 14, 1973 and July 18, 1973 overruling the motion to certify and dismissing Petitioners appeal of right, dismissing the appeal from the Court of Appeals for Delaware County, Ohio, affirming the judgment of the Court of Common Pleas of Delaware County, Ohio, in Case Nos. 20,992 and 21,069.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Delaware County, Ohio, rendered a written decision on December 12, 1972 (Appendix A, infra p 6).

JURISDICTION

The order of the Supreme Court of Ohio, entered on the 18th day of July, 1973, denying jurisdiction is attached hereto (Appendix D, infra p15).

The jurisdiction of this Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257 (3), which provides for review of final judgments rendered by the highest court of a state by writ of certiorari, "where any title, right, privilege

or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTION PRESENTED

Where Respondent appropriated sufficient property to construct a water reservoir and allocated a definite boundary in its original engineering plans and specifications for a protective-strip for the safety of the abutting lot owners, and the abutting lot owners relied on such protective-strip as lateral-support for their lots, and where Respondent failed to keep in repair some of its lateral-support or protective-strip, which negligence resulted in causing portions of Petitioners' property to erode – is there a legal duty imposed upon Respondent to repair and/or provide protective works, and should mandatory injunction be granted to require Respondent to construct protective works on its protective-strip or on Petitioners' abutting property, especially where Petitioners are willing to sell easements to Respondent for such use; is the denial of such remedy and the erosion of parts of Petitioners' lands through Respondent's neglect a taking of Petitioners' property without due process contrary to the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 19, Article I, Ohio Constitution:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war

or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner. (See Const 1802, Art VIII, §4.)

STATEMENT OF THE CASE

Petitioners own improved residence properties adjacent to the land owned by Respondent, which land abuts the shoreline of Hoover Reservoir owned by Respondent.

Petitioners' lands are now being eroded due to the fact that Respondent refused and neglected to repair its protective-strip which served as lateral-support for Petitioners' properties.

Respondent did rip-rap the properties of some of the neighbors of Petitioners, which neighbors were formerly Plaintiffs in the Court below, and their appeal has been settled and dismissed.

Respondent refuses to save the erosion of Petitioners' properties for the reason that it is not *economically feasible* but will acquire such properties and allow them to erode.

Petitioners are willing to sell easements over their properties under the same circumstances as Respondent acquired easements over properties of the Plaintiffs who settled with Respondent.

At the time Petitioners filed their injunction, there were no appropriation proceedings filed by Respondent.

There is no appropriation proceeding filed or pending against Petitioners Edwards and Lastorias. **Yet their lands are being taken by Respondent.** Subsequent to the filing of the Petitioners' petition, appropriation proceedings were filed against Petitioners Trapps.

Respondent's project caused some portions of Petitioners' lands to be eroded before any appropriation proceedings were filed. Petitioners' properties are situated next to the properties of those Plaintiffs whose properties are rip-rapped. The value of Petitioners' properties are practically the same as the value of the properties which are already rip-rapped. Petitioners pray for the same relief that Respondent gave to their neighbors. Not giving Petitioners the same relief that was granted to their neighbors is discriminatory.

Subsequent to the filing of complaints in the Common Pleas Court, Petitioners filed their motion to show that their properties were actually caused to erode through the neglect of the Respondent, and they were not compensated for the loss of their land.

Petitioners' remaining lands should be preserved in the same manner as their neighbors' lands are preserved. The cost to preserve Petitioners' remaining lands would be no greater than the cost of their neighbors' properties which were rip-rapped by Respondent.

Save the Soil is a Federal Project. This is exactly what Petitioners are urging Respondent to do. Instead, Respondent is actually in the act of acquiring Petitioners' properties to allow them to erode *and not to control erosion.*

HOW FEDERAL QUESTIONS PRESENTED

The Constitutional question here involved was first put in issue in the trial Court, in the Court of Appeals, in the notice of appeal, and in the memorandum in support of jurisdiction in the Supreme Court of Ohio in Case No. 73-372.

REASONS FOR GRANTING THE WRIT

A. The State Court's rulings are confiscatory and are a taking of Petitioners' property without due process.
B. The State Courts disregarded the owners' rights to be protected in their property. By allowing the

Respondent to allow erosion of Petitioners' property without just compensation is contrary to the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Ohio.

The Fourteenth Amendment to the Constitution of the United States protects private property from appropriation by a state without due process of law. See, Cincinnati v. Louisville & Nashville R. Co., 223 U.S. 390, 56 L. Ed. 481, 32 Sup. Ct. 267; Bank of Toledo v. Toledo, 1 Ohio St. 622 (1853); 19 O. Jur. (2d) 414. Eminent Domain, Section 7; 2A Nichols on Eminent Domain (3rd Ed., 1970), Section 7.31.

The constitutional provisions which require due process of law are of general application to all branches of government and thus affect the power of eminent domain. On the one hand, the sovereign is vested with the inherent right of eminent domain. *On the other hand, the property owner is vested with an equally inherent and fundamental right not to be deprived of his property without due process of law.* This conflict has been resolved in favor of the right of the property owner to the extent that the exercise of the power of eminent domain is limited by the prohibition against depriving a person of his property without due process of law. Hessel v. A. Smith & Co., 15 F. Supp. 953 (1936); Sargent v. City of Cincinnati, 25 N.P. (NS) 89, affirmed 110 Ohio St. 444 (1923).

The evidence in the case at bar is quite explicit that respondent neglected to keep in repair the lateral support for petitioners' property. The testimony of the witnesses shows that it would be feasible to rip rap petitioners property rather than to deprive petitioners of their land. The costs for these three properties is not prohibitive since the next door neighbors property is rip rapped there is no difference in the land and there is no reason for discriminating between the Plaintiff's who are not now involved in this case who have received their rights to have their properties rip rapped and the present petitioners.

There was no appropriation petition pending against any of the petitioners at the time when petitioners sought their relief in the state courts. The decision of the

state courts disregards entirely the fact that petitioners lands were being taken without due process of law.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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COURT OF APPEALS, FIFTH DISTRICT
DELAWARE COUNTY, OHIO

CHARLES NICKLAUS, *et al*,
Plaintiffs-Appellants,
vs.
CITY OF COLUMBUS, OHIO,
Defendant-Appellee,
and
HELEN M. RIPPEL, *et al*,
Plaintiffs-Appellants,
vs.
CITY OF COLUMBUS, OHIO,
Defendant-Appellee.

JUDGES:
HON. LELAND RUTHERFORD, PJ
HON. NORMAN J. PUTMAN
HON. PAUL D. VAN NOSTRAN

Case No. 72-4-A

M E M O

Case No. 72-4-B

Decided Nov. ...., 1972.

APPEARANCES

HUGH E. KIRKWOOD, JR. and LEDA C. HARTWELL, attorneys for Plaintiff-Appellants.
JAMES J. HUGHES, JR., ROBERT A. BELL, EARL J. SILBERMAN, DONNA J. BOWMAN, attorneys for Defendant-Appellee.

PUTMAN, J.

Only three appeals remain before this court: Edwards, Trapp and Lastoria. It was represented to the court by appellants' counsel that the appeal of Arnold was terminated May 13, 1972 by action reflected in Deed Book 366, page 152 of the Delaware County records.

There are six Assignments of Error styled but the essence of all is that the refusal to grant the injunction was an abuse of discretion and contrary to law.

We overrule all assigned errors and affirm the judgment. Our reasons follow.

Appellants filed suit against appellee demanding equitable relief in the following causes of action:

1. To enjoin appellee from proceeding in eminent domain to appropriate appellants' property on the grounds there is no public necessity and, therefore, no public use or public purpose.

2. Mandatory injunction to require appellee to constructive protective works on appellee's property to control natural erosion.

The trial court found for the appellee and determined that from the facts in this case the appellee was proceeding in actions in appropriation according to law for a public purpose and that appellee has no legal duty to provide protective works on its or appellants' properties.

The trial court after consideration overruled a subsequent motion submitted December 20, 1971, by appellants requesting a temporary restraining order and oral argument.

The trial court also made separate Findings of Fact and Conclusions of Law.

The evidence supports the appellee's (City) statement of facts which is substantially the following.

Appellee owns, operates and maintains, as part of its water system, a public utility known as Hoover Reservoir. It also serves as a recreational facility for the public generally. The land and water area lies partly in Franklin

County and partly in Delaware County. The shoreline around the water area is presently owned in fee simple by appellee in varying distances from the water's edge. The entire area, including the shoreline, is available to the public. The construction of the dam was completed about 1954 and became operative in 1955.

Frank Wright, Superintendent, Division of Water of appellee, testified at the time of trial, that in 1965 it became apparent there was a critical shortage of water. The only apparent relief at that time was a federally sponsored project, Alum Creek Dam, which was continually delayed because of a shortage of funds. A determination was made that the target date for the completion of the federal project was too speculative to place any reliance upon it as a source of relief.

Along with the water shortage appellee also determined there was a need for flood and erosion control and additional property appropriation to protect and maintain the reservoir generally.

Appellee appropriated $100,000 for professional engineering services and entered into a contract with Burgess and Niple, Columbus, Ohio. See appellee's Exhibit A (hereafter A/E) Ordinance 1108-69.

The results of the engineers' studies and reports and appellee's own findings indicated that eight feet flood gates should be constructed for increased water supply and flood control. In addition, it was determined that in areas where structures on abutting private property were threatened, protective measures to help control erosion should be used and rip-rap, although expensive, was suggested either as to all or part of a parcel, based on good engineering practices. In other areas, appellee, because of protective covering not being feasible, and/or because of prohibitive costs, determined to allow natural erosion. However, also to protect the public character of the reservoir generally it was determined that it was necessary to make additional appropriations of private property. (See Exhibit F)

The incidental benefit to the abutting private property owners was, in some cases, protective covering, while in

others there would be no loss of their remaining private property to erosion.

Appropriations to accomplish those purposes was, at the time of trial, $580,000, plus the $100,000 for engineering services.

See A/E B and C, Ordinances 1088-70 and 459-17, the latter of which included 12 parcels to be appropriated, including appellants, Trapp.

However, the maximum height to which the flood gates have been raised is 1.7 feet in May, 1970, which increased the level of the reservoir to 891.7 feet.

The eight foot flood gates were erected about 1970.

The level of the water in the reservoir is 890 feet above sea level. *If* the gates were completely raised the highest possible level would then be 898 feet. However, it was never raised higher than 1.7 feet, which was in May, 1970 (R/P 266, F. Wright's testimony). The highest they could be raised at time of trial was 3 feet. T/P 266.

Yet, at any level the appellants' property at existing property lines would not be flooded according to the engineer's report, Mr. Wright's testimony and appellee's Exhibit 4, Burgess & Niple's map of the reservoir, surrounding shoreline and appellants' properties.

When appellants became aware of the pending appropriations suit was brought to require appellee to put protective works on its and appellants' properties and to enjoin the appropriation proceedings.

Appellee does not deny that erosion has taken place along the shoreline. Appellee does deny that appellants' properties are eroded or flooded; that appellee has a legal duty to provide protective works on its property or that of appellants to prevent natural erosion or that appellee has no right to appropriate.

The nub of the relief requested of the Common Pleas Court was stated in oral argument to be:

1. orders to construct erosion preventing structures on city property.

2. orders stopping allegedly unnecessary taking by eminent domain of appellant's land.

The second conclusion of law as determined by the trial court is:

> "2. Defendant has not abused its discretion, committed fraud or acted arbitrarily in the erection of flood gates or in the present stage of proceedings for increasing its water supply, controlling downstream flooding, controlling erosion to its property or others and in eminent domain proceedings."

At the present stage of proceedings the flood gates have been constructed to raise the level of the water three feet although when completed it would be possible to increase the level eight feet, from a present 890 feet above sea level to 898 feet above sea level.

As explained in the statement of facts the appellees goals were fourfold:

1. To increase a water supply for the inhabitants of the City of Columbus.

2. To control the flow of water downstream in the interests of flood control.

3. To institute an erosion control program.

4. To protect the appellee's investment in Hoover Reservoir for the preservation of the public peace, property, health, safety and welfare.

The trial court found no abuse of discretion, arbitrariness or fraud on the part of the appellee.

In the findings of fact, the court determined that appellee owned the public utility of Hoover Reservoir and the surrounding shoreline to varying degrees. It further found that the flood gates, were erected for the public purpose of increasing appellees' water supply and to control downstream flooding and that engineering studies were made concerning erosion and that appellee has lawfully determined to proceed with the projects and cannot be required

to provide plaintiffs with protective works or to install such works on its own property. The court further found that appellee is proceeding in a lawful manner in acquiring additional property by paying or proposing to pay just compensation and putting the additional property to a public use. (Findings 1 through 8 inclusive.)

This Court of Appeals finds no abuse of discretion to appear upon the whole record.

To successfully maintain a cause of action for injunctive relief, appellants must show a clear right thereto, and sustain the necessary burden of proof by clear and convincing evidence. We find no such evidence.

The trial court in Findings of Fact 1, 2, 3, 6 and 8 and Conclusions of Law 1 and 3 has determined the public purpose and use of the Reservoir as a utility and that the proposed acquisition of appellant's properties is for a public use and purpose. We find no abuse of discretion by the court in these statements, and find the acquisition is for a public purpose.

Many of the grievances aired by appellants at the oral argument may carry great weight in proceedings to determine how much money will be necessary to compensate them for the property taken and damage to the residue.

While this court is aware of the rights of the appellants in such a proceeding those matters are beyond our power to adjudicate in this appeal.

All assignments overruled.

Judgment entry to be submitted dismissing the appeals as to those appellants with whom the City of Columbus has made settlement and affirming the judgments appealed from by appellants with whom settlement has not been made.

RUTHERFORD, P. J. and VAN NOSTRAN, J., concur.

NORMAN J. PUTMAN
LELAND RUTHERFORD
PAUL D. VAN NOSTRAN,
Judges.

COURT OF APPEALS, FIFTH DISTRICT
DELAWARE COUNTY, OHIO

CHARLES NICKLAUS, *et al.*,
Plaintiffs-Appellants,
vs.
THE CITY OF COLUMBUS, OHIO,
Defendant-Appellee.
and
HELEN M. RIPPLE, *et al.*,
Plaintiffs-Appellants,
vs.
THE CITY OF COLUMBUS, OHIO,
Defendant-Appellee.

Case No. 72-4-A

Case No. 72-4-B

ENTRY

This cause came on for consideration of the Court on appeal from the Common Pleas Court of Delaware County, Ohio, of six assignments of error on questions of law and the Court, having considered briefs and oral arguments of counsel for the appellants and appellees, finds that the six assignments of error should be overruled and that judgment of the said Court of Common Pleas should be affirmed.

The Court further finds that the only remaining appellants in this matter are the following named persons, i.e. A. P. and Josephine Lastoria, H. J. and Ruth J. Edwards and Orlo C. and Frances V. Trapp, all others being dismissed as to this appeal.

This cause came on for further consideration of this court upon appellants' motion for reconsideration of its decision filed December 12, 1972. The Court, being fully advised in the premises, finds the motion not well taken and should be overruled.

It is therefore ordered, adjudged and decreed that the six assignments of error should be and hereby are overruled and that the judgment of the Court of Common Pleas of Delaware County should be and hereby is affirmed.

It is further ordered, adjudged and decreed that the only appellants in this appeal are A. P. and Josephine Lastoria, H. J. and Ruth J. Edwards and Orlo C. and Francis V. Trapp.

It is further ordered, adjudged and decreed that appellant's motion for reconsideration should be and hereby is overruled.

Judgment affirmed. Costs to appellants.

.....

LELAND RUTHERFORD, *Judge*

.....

NORMAN J. PUTNAM, *Judge*

.....

PAUL D. VAN NOSTRAN, *Judge*
Court of Appeals—Fifth District
Delaware County, Ohio

APPROVED:

.....

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THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1973 Term
To wit: June 14, 1973

CHARLES NICKLAUS et al.,
Appellants,
vs.
CITY OF COLUMBUS,
Appellee.

No. 73-372
APPEAL FROM THE COURT OF APPEALS
for Delaware County

This cause, here on appeal as of right from the Court of Appeals for Delaware County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Delaware County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this_____

day of_____ 19____

_____ Clerk

_____ Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1973 Term

To wit: July 18, 1973

CHARLES NICKLAUS et al.,
Appellants,
vs.
CITY OF COLUMBUS,
Appellee.

No. 73-372
REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of July, 1973.

THOMAS L. STARTZMAN, *Clerk.*

By ..... *Deputy.*

PERTINENT CONSTITUTIONAL PROVISIONS

The text of the relevant constitutional provisions involved are:

CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 19, ARTICLE I, OHIO CONSTITUTION

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

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No. 73-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

HERMAN EDWARDS, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, OHIO,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 73-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

HERMAN EDWARDS, ET AL.,*
Petitioners,

vs.

THE CITY OF COLUMBUS, OHIO,
Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent prays that a Writ of Certiorari to review the judgments of the Supreme Court of Ohio, the Court of Appeals, Fifth Appellate District, Delaware County, Ohio, and the Common Pleas Court of Delaware County, Ohio, be denied because there were no Federal Constitutional questions concerning the due process clause or the equal protection clause of the Fourteenth Amendment decided by the state courts or raised therein nor was there any reliable, probative or substantial evidence admitted concerning those questions. The judgment of the state courts represents the correct application of the state law.

* H. J. and Ruth J. Edwards, Orlo C. and Frances V. Trapp, and A. P. and Josephine Lastoria.

OPINIONS BELOW

The Ohio Supreme Court dismissed the appeal and denied a motion for rehearing on the ground no substantial constitutional question exists (Appendices C & D, pages 14 and 15, Petition). The Court of Appeals, Fifth District, Delaware County, rendered a written decision and judgment (Appendix A, pages 6 through 13, Petition). The Common Pleas Court made findings of facts and conclusions of law as printed in full as Appendix A, page 12 and a judgment entry, Appendix B, page 15.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

Whether the United States Supreme Court will grant a Writ of Certiorari relating to the issues of deprivation of private property without due process of law and a denial of equal protection under the Fourteenth Amendment, U. S. Constitution, where neither issue was raised in the state trial court nor specifically raised in the state court of appeals and where the state supreme court found that no substantial constitutional question existed.

Whether a municipal corporation, owner of a public reservoir including all riparian rights thereto, acting pursuant to law for public necessities, purposes and uses, abridges the due process clause or the equal protection clause of the Fourteenth Amendment to the U. S. Constitution as to abutting private property owners where it:

1. Institutes negotiations and actions in eminent domain against abutting owners;
2. Selects riparian areas of property it owns or controls around the reservoir upon which to do certain lawful acts or to omit doing them;

3. Refuses to construct protective works not only upon property it owns or controls but upon private property, as demanded by petitioners, which private property has suffered no damage.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution:

> "Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws:

Ohio Constitution, Section 19 of Article I:

> § 19 [Inviolability of private property.]
> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Constitution, Section 4 of Article XVIII:

> § 4 [Acquisition of public utility; contract for service; condemnation.]
> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or

> its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Ohio Revised Code, Title 7, Sections 719.01, 719.02 and 743.01, are printed in full in Appendices C, D, and E, respectively, *infra*, pp. 17, 21 and 22.

STATEMENT OF THE CASE

Respondent owns, operates and maintains Hoover Reservoir, as a water supply system and public recreational area, for use by the public generally. It lies partly in Franklin County and partly in Delaware County.

In 1965 Respondent determined a critical water shortage would shortly occur based on the then present supply. Respondent's City Council appropriated $100,000 and authorized engineering studies to be made of the reservoir for the public purposes of increasing the water supply, erosion and flood control, maintenance of the public character of the reservoir and surrounding shoreline, and protection of the public investment.

The engineering studies resulted in several solutions adopted by Respondent which included:

1. The erection of eight foot flood gates at the dam to increase the water supply and aid in controlling downstream erosion and flooding.
2. The appropriation of additional shoreline to maintain the public character and public use of the reservoir at all shoreline points and to control erosion of private property.

3. The protection of certain shoreline areas by providing protective covering (rip rap) on **Respondent's** property where it was necessary and feasible based upon sound engineering practices and where private dwellings might suffer erosion damage within the next ten to twenty years.

The level of water in the reservoir is 890 feet above sea level. The erection of the flood gates, completed in 1970, could raise the level to 898 feet which level would still **not** innundate Petitioners' properties.

The entire shoreline is owned by Respondent in fee to varying depths from the water's edge. The additional appropriations are to include parts of Petitioners' properties and an option was given to all property owners, subject to actions in eminent domain, that the Respondent would agree to accept public use and flood easements in lieu of appropriating a fee simple if the negotiations could be satisfactorily settled out of court.

The engineering studies also showed it would not be feasible to provide protective coverings for the entire shoreline both from sound engineering practices and from the cost factor. Not only would the protective covering be useless and ineffective on some areas due to the slope of the banks and condition of the soil, but it would also interfere with shoreline public recreational activities. Further, to rip rap the entire shoreline would be economically prohibitive.

Petitioners own no property abutting the water's edge.

Petitioners were seeking to enjoin Respondent from proceeding in eminent domain and to require Respondent to construct protective works on both Respondent's and Petitioners' property.

There were **no** protective works provided on any of the shoreline when the reservoir was completed.

There are presently no protective works on any private property except where Respondent has decided it is necessary and has a direct and perpetual easement for public use and purposes which effectively eliminates its exclusively private use.

Respondent has proceeded in all instances pursuant to law to acquire additional property for public purposes and necessities.

ARGUMENT

I

Federal Constitutional Questions Must Be Raised And Ruled Upon In State Courts.

The due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution were not raised in the state court until appeal to the Ohio Supreme Court. The United States Supreme Court will not decide whether constitutional rights have been violated when federal questions are not raised in accordance with the requirements of state law. *Chicago, Indianapolis and Louisville Ry. v. McGuire,* 196 U.S. 128, 49 L.Ed. 413, 25 S.Ct. 200; *Hulbert v. Chicago,* 202 U.S. 275, 50 L.Ed. 1026, 26 S.Ct. 617; *Edelman v. California,* 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293.

It is a rule in Ohio that a constitutional question in a civil or criminal case cannot be raised in the Supreme Court unless it was first presented in the lower courts. *State, ex rel., King v. Shannon,* 170 Ohio St. 393; *Hoffman v. Stanley,* 92 Ohio St. 505; *Cuthbertson v. State,* 106 Ohio St. 658; *Zimmerman v. Morris Plan Bank of Cleveland,* 113 Ohio St. 703; *Village of Clarington v. Althar,* 122 Ohio St. 608.

The decisions of the Common Pleas Court and Court of Appeals for Delaware County were based solely on

state law. The decision by the Ohio Supreme Court dismissing the appeal does not indicate whether the federal issue raised was even considered. The dismissal rests on adequate state law. The United States Supreme Court will not review judgments of state courts that rest on adequate state grounds. *Hammerstein v. Superior Court of the State of California*, 340 U.S. 622, 95 L.Ed. 586, 71 S.Ct. 521; *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429.

The United States Supreme Court is bound by a state court's decision interpreting state statutes. *Carstairs v. Cochran*, 193 U.S. 10, 48 L.Ed. 596, 24 S.Ct. 318; *Quang Ham Wah Co. v. Industrial Accident Comm.*, 225 U.S. 445, 65 L.Ed. 723, 41 S.Ct. 373; *Spieser v. Randall*, 357 U.S. 513, 2 L.Ed. 2d 1460, 78 S.Ct. 1332; *Garner v. Louisiana*, 368 U.S. 157, 7 L.Ed. 2d 207, 82 S.Ct. 248.

Cox, et al., v. Texas, 202 U.S. 446, 50 L.Ed. 1099, 26 S.Ct. 671 (1906) states in the fourth paragraph of the syllabus:

> "A federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on a writ of error to the state court, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground it was not raised in the trial court."

II

The State Courts' Findings Were Based On Adequate State Law.

The trial court was confronted with deciding whether Respondent complied with state law as to proceedings in eminent domain and whether Respondent abused its discretion, committed fraud or acted arbitrarily in doing acts described in the statement of the case and whether

Respondent had a legal duty to do positive acts demanded by Petitioner to control **threatened** but not **actual** erosion upon Petitioners' property.

The court made these determinations in Findings of Facts No. 6 through 8 and Conclusions of Law 1 through 4, Appendix A, page 13.

The Court of Appeals is limited to deciding appeals on questions of law only. The question was whether the evidence supported the Findings of Facts and Conclusions of Law and Judgment and, if not, whether the trial court abused its discretion in rendering judgment for Respondent. Petitioners' six assignments of error were overruled in their entirety. Appendix A, pages 7 and 11, Petition. The appellate court found the evidence supported the Findings of Fact and the Conclusions of Law, that there was no abuse of discretion on the whole record and that Petitioners failed to sustain their burden of proof by clear and convincing evidence. Appendix A, pages 7 and 11, Petition.

III

Petitioners' Citations Are Not Related To The Case.

Bank of Toledo v. Toledo, 1 Ohio St. 633 (1853) determined matters concerning the effect of corporate charters and franchises, surrendering legislative taxing power, inviolability of contracts, *inter alia.*

Cincinnati v. Louisville and Nashville R.R., 223 U.S. 390, 56 L.Ed. 481, 32 Sup. Ct. 267 (1912) discussed whether an ordinance of 1787, Northwest Territory, and the constitutional inhibition against impairment of contracts limited the exercise of the power of eminent domain.

In *Hessel v. A. Smith & Co.*, 15 F.Supp. 953 (1936) plaintiff sought an injunction against Smith Co., contractor with the United States to build a post office on plaintiff's property because the condemnation proceedings by the United States were not finalized. The court denied injunctive relief saying it was unnecessary to have the condemnation suit fully adjudicated.

In *Sargent v. Cincinnati*, 25 N.P. (N.S.) 89, *aff'd* 110 Ohio St. 444 (1924) the court found the city was a perpetual leaseholder of plaintiff and could not proceed in eminent domain against him as this would be an impairment of a contractual obligation by legislative or judicial proceedings contrary to constitutional provisions.

None of the facts or decisions of the foregoing cases had any relevance to due process or equal protection clauses of the Fourteenth Amendment, U. S. Constitution, as those clauses relate to the facts herein.

The secondary authorities of *19 Ohio Jurisprudence 2d*, §7, "Eminent Domain," at page 414, as well as Nicholas, *Eminent Domain* (3d ed. 1970) §7.31, merely state the Fourteenth Amendment limits the power of eminent domain but no relationship is shown to the findings and judgments of the state courts.

See *16 American Jurisprudence 2d*, "Constitutional Law, §495, "Legislative Discretion and Power," pages 862 and 863.

IV

Petitioners Have Not Been Deprived Of Property Without Due Process Nor Have They Been Denied Equal Protection.

The exercise of the power of eminent domain is the exercise of a police power. Paragraph five of the syllabus

of *Benjamin v. Columbus*, 167 Ohio St. 103, 4 Ohio Ops. 2d 113, 146 N.E. 2d 854, *cert. denied* 357 U.S. 904, 2 L.Ed. 2d 1155, 78 Sup.Ct. 1147, states:

> "5. Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary."

Equal protection could not be an issue for the reason that even though some abutting property owners might receive an incidental beneficial result from the construction of protective works, the construction is upon land owned or controlled by Respondent and Petitioners have not shown they are in a class that was denied equal protection. Yet if equal protection is an issue, each owner is not in the same class because each owns a **unique** parcel which abuts a **unique** area of shoreline. In adopting a classification the legislature has wide discretion. *Wessell v. Timberlake*, 95 Ohio St. 21, at 39 and 40; *State v. Norval Hotel Co.*, 103 Ohio St. 361, at 366 and 367. Petitioners have not established themselves into any class other than the insufficient requirement of being an abutting owner.

CONCLUSION

For the foregoing reasons the Petition should be denied.

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APPENDIX A

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 20.992

CHARLES NICKLAUS, ET AL.,
Plaintiffs,

vs.

CITY OF COLUMBUS, OHIO,
Defendant.

No. 21.069

HELEN M. RIPPEL, ET AL.,
Plaintiffs,

vs.

CITY OF COLUMBUS, OHIO,
Defendant.

FINDINGS OF FACTS

1. Plaintiffs own real estate adjacent to land owned by Defendant which land abuts the shoreline of Hoover Reservoir also owned by Defendant which is a public utility serving a public purpose.

2. Hoover Dam and the abutting shoreline is owned by Defendant in fee simple and is part of a public utility used to supply water to the citizens of Defendant City.

3. Defendant has made studies and instituted a project, namely erecting eight foot flood gates, for the public purpose of increasing its water supply, as it will shortly

become critical, and for the public purpose of controlling downstream flooding.

4. Engineering studies were made which projected, among other things, erosion on the shoreline.

5. Defendant has concluded from these studies that along some of the shoreline, where economically feasible, protective works should be erected and on other parts of the shoreline the land should be allowed to erode.

6. Defendant, in accordance with its plans, is proceeding according to law through its legislative arm and by legislative determination, to effect acquisition of additional property, to increase its water supply, to control downstream flooding, to protect the public peace, health, safety, welfare and property, the public utility and to paying just compensation to all whose property is acquired for this public purpose.

7. From the evidence presented the City Council of Defendant has lawfully determined to proceed with this public utility project and cannot be required to provide all plaintiffs lands with protective works or be required to put protective works on its own property.

8. Defendant, through its agencies and City Council, has and is proceeding in a lawful manner to acquire additional property to its present shoreline by paying or proposing to pay just compensation and putting the additional property to a public use.

The Court finds the following conclusions of law:

CONCLUSIONS OF LAW

1. Defendant, pursuant to Section 4, Article XVIII and Section 19, Article I of the Ohio Constitution, may acquire, own, lease and operate a public utility and may

acquire property for this purpose and Hoover Reservoir, the surrounding land all of which is owned by Defendant and the additional property to be acquired by Defendant, is for a public purpose for which just compensation has been paid or proceedings to pay it just compensation have been effected according to law.

2. Defendant has not abused its discretion, committed fraud or acted arbitrarily in the erection of flood gates or in the present stage of proceedings for increasing its water supply, controlling downstream flooding, controlling erosion to its property or others and in eminent domain proceedings.

3. Defendant is presently using its property in a lawful manner and contemplates the lawful use of property to be acquired from Plaintiffs according to law and the Court will not, therefore, interfere with the present use of presently owned property or the intended use of property to be acquired by Defendant.

4. Under the facts presented and applying the laws and Constitution of the State of Ohio, the Court finds, as a matter of law, the Plaintiffs are not entitled to the relief prayed for, either injunctive relief or by the way of mandamus.

S/GALE B. WELLER, *Judge*
Sitting by Assignment

APPENDIX B

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

No. 20,982

CHARLES NICKLAUS, ET AL.,
Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO,
Defendant.

No. 21,069

HELEN M. RIPPEL, ET AL.,
Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO,
Defendant.

JUDGMENT ENTRY

These causes having been consolidated for purposes of trial, came on to be heard on the pleadings, evidence, briefs and arguments of counsel and the Court being fully advised in the premises finds that neither injunctive relief nor mandamus are available to plaintiffs under the facts of these cases and further finds the issues herein in favor of the defendant, City of Columbus, with respect to all causes of action.

It is, therefore, ordered, adjudged and decreed that the within causes be and the same are hereby dismissed.

Costs to plaintiffs.

Exceptions to plaintiffs.

S/GALE B. WELLER, *Judge*

APPROVED:

S/LEDA C. HARTWELL
S/HUGH E. KIRKWOOD, JR.
Attorneys for Plaintiffs

S/JOHN C. YOUNG, *City Attorney*
S/WILLIAM J. MELVIN, *Chief Trial Atty.*
S/EARL J. SILBERMAN, *Sr. Asst.*

APPENDIX C

Ohio Revised Code, Title 7:

§ 719.01 Appropriation of property by municipal corporations.

Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits:

(A) For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose, the municipal corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of such property, and for obtaining material for the improvement of streets and other public places;

(B) For parks, park entrances, boulevards, market places, and children's playgrounds;

(C) For public halls and offices, and for all buildings and structures required for the use of any municipal department;

(D) For prisons, workhouses, houses of refuge and correction, and farm schools;

(E) For hospitals, pesthouses, reformatories, crematories, and cemeteries;

(F) For levees, wharves, and landings;

(G) For bridges, aqueducts, viaducts, and approaches thereto;

(H) For libraries, university sites, and grounds therefor;

(I) For constructing, opening, excavating, improving, or extending any canal or watercourse, located in whole or in part within the limits of the municipal corporation or adjacent and contiguous thereto, and which is not owned in whole or in

part by the state, or by a company or individual authorized by law to make such improvements;

(J) For sewers, drains, ditches, public urinals, bathhouses, water closets, and sewage and garbage disposal plants and farms;

(K) For natural and artificial gas, electric lighting, heating, and power plants, and for supplying the product thereof;

(L) For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around, and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air, and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto;

(M) For providing a water supply for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites, and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without its limits; and for such purpose and [any] such municipal corporation may appropriate, in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code, any property or right or interest therein, previously acquired by any private corporation for any purpose by appropriation proceedings or otherwise, and either party to such appropriation proceedings shall have the same right to change of venue as is given in the trial of civil actions;

(N) For the construction or operation of street, interurban, suburban, or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, ma-

chine shops, bridges, and other appurtenances for the transportation of persons, packages, express matter, freight, and other matter, in, from, into, or through the municipal corporation; and for such purpose any municipal corporation may appropriate any property within or without its corporate limits; and any municipal corporation may appropriate any property, right, or interest therein previously acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over, or under any street, avenue, alley, way, or public place or part thereof of any other municipal corporation, township, or county;

(O) For establishing airports, landing fields, or other air navigation facilities, either within or without the limits of a municipal corporation for aircraft and transportation terminals, with power to impose restrictions on any part thereof and leasing such part thereof as is desired for purposes associated with or incident to such airports, landing fields, or other air navigation facilities and transportation terminals, including the right to appropriate a right of way for highways, electric, steam, and interurban railroads leading from such airport or landing field to the main highways or the main line of such steam, electric, or interurban railroads, as are desired; all of which are hereby declared to be public purposes.

Division (O) of this section does not authorize a municipal corporation to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, relocation, or duplication of such property or facilities elsewhere, at the sole cost of the municipal corporation.

The powers conferred upon municipal corporations by this section shall be exercised for the purposes and in the manner provided in sections 163.01

to 163.22, inclusive, of the Revised Code.

"Airport," "landing field," and "air navigation facility," as defined in section 4561.01 of the Revised Code, apply to division (O) of this section.

APPENDIX D

Ohio Revised Code, Title 7:

§ 719.02 Appropriation of property outside municipal corporation; payment in lieu of taxes.

In the appropriation of property for any of the purposes named in section 719.01 of the Revised Code, the municipal corporation may, when reasonably necessary, acquire property outside the limits of the municipal corporation.

If real property so acquired is removed from the tax duplicate, the municipal corporation shall pay annually to the county treasurer of the county in which such property is located, commencing with the tax year after the removal of such property from the tax duplicate, an amount of money in lieu of taxes equal to the smaller of the following:

(A) The last annual installment of taxes due from the acquired property before removal from the tax duplicate;

(B) An amount equal to the difference between the combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate, and (1) the total revenue which would be produced by the tax rate of each such taxing district in the tax year immediately prior to the removal of such acquired property from the tax duplicate, applied to the real estate tax duplicate of each of such taxing districts in each tax year subsequent to the year of removal, or (2) the combined revenue from real estate taxes of all such taxing districts in each tax year subsequent to the year of removal, whichever is the greater.

The county auditor of each county in which such property is located shall apportion each such annual payments to each taxing district as if such annual payment had been levied and collected as a tax.

Such annual payments shall never again be made after they have ceased.

APPENDIX E

Ohio Revised Code, Title 7:

§ 743.01 General powers of legislative authority. (GC § 3955)

The legislative authority of a municipal corporation may take possession of any land obtained for the construction or extension of water works, reservoirs, or the laying down of pipe, and also any water rights or easements connected with the use of water. Any land, water right, or easement so taken possession of for water-works purposes shall not be used for any other purpose, except by authority of the director of public service and with consent of such legislative authority.